

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

**ORDER DENYING CERTIFICATION
OF RESPONDENT'S MOTION, BUT
GRANTING A TEMPORARY STAY**

vs.

Mid-America Dairymen, Inc.,

Respondent.

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on Respondent's Motion for Certification of Motion for Protective Order and a Stay. The current motion seeks certification of Respondent's prior Motion for Protective Order and a Stay which had been denied in part and granted in part by an Order of the Administrative Law Judge dated October 8, 1996.

Douglas W. Thompson, Douglas W. Thompson, Ltd., 332 Minnesota Street, Suite W-1260, St. Paul, Minnesota 55101, appeared on behalf of Respondent, Mid-America Dairymen, Inc. Susan C. Gretz, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55103-2102, appeared on behalf of Complainant, the Department of Labor and Industry (the Department or Complainant). The record on the motion was closed on October 28, 1996, upon receipt of Complainant's Response.

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Respondent's Motion for Certification of Motion for Protective Order and a Stay is DENIED.
2. This matter is stayed 30 days to allow Respondent to apply for a writ of prohibition and, if such application is made, the stay is extended for whatever additional period is required for the court to make a determination on the application. Respondent shall keep the Administrative Law Judge advised as to the status of any such application.

Dated this ____ day of November, 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

This matter involves the appeal of an OSHA citation imposing penalties for violation of OSHA standards related to the death of an employee at Respondent's Zumbrota, Minnesota, facility. The incident occurred on October 25, 1995, when the employee fell into a cheese-grinding machine and was killed. The OSHA inspection took place on October 25-30, 1995. Shortly thereafter, local law enforcement authorities, including the Goodhue County Attorney, executed a search warrant at Respondent's facility and took possession of a large number of documents. The OSHA inspector assisted the law enforcement authorities in that search. No criminal charges have been filed to date.

In Respondent's Motion for Protective Order and a Stay (the Prior Motion) a stay was sought in this matter until any criminal matter arising out of the incident had been resolved or the applicable statute of limitations had expired. Respondent also sought a protective order with regard to Complainant's discovery requests, claiming that such requests were oppressive and unduly prejudicial, particularly in light of its employees' right against self-incrimination. In the Order of October 8, 1996, the Administrative Law Judge denied the request for a stay and partially granted the protective order by limiting some of the interrogatories. Respondent now seeks certification of the Prior Motion under Minn. R. 1400.7600. Respondent asserts that complying with the Department's discovery requests will cause it "irreparable damage" and force it to "waive appropriately

raised privileges.” Respondent’s Memorandum at 6. The Department objects to certification arguing that the rule standards for certification are not met in this matter, the subject-matter of the ruling is solely within the Administrative Law Judge’s area of expertise, and certification is not statutorily authorized because the Administrative Law Judge’s order will be the final agency decision in this matter. Complainant’s Response at 1.

The standards for certification of a motion to an agency are set out in Minn. R. 1400.7600, which states:

No motions shall be made directly to or be decided by the agency subsequent to the assignment of a judge and prior to the completion and filing of the judge’s report unless the motion is certified to the agency by the judge. No motions will be certified in cases where the judge’s report is binding on the agency. Uncertified motions shall be made to and decided by the judge and considered by the agency in its consideration of the record as a whole subsequent to the filing of the judge’s report. Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing, other than rulings on the admissibility of evidence or interpretations of parts 1400.5100 to 1400.8400, be certified by the judge to the agency. In deciding what motions should be certified, the judge shall consider the following:

- A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or
- B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or
- C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
- D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- E. whether it is necessary to promote the development of the full record and avoid remanding; or
- F. whether the issues are solely within the expertise of the agency.

Under Minn. Stat. § 182.661, subd. 3, the decision of the Administrative Law Judge in OSHA cases is the final decision of the Commissioner of Labor and Industry and the decision may be appealed by any party to the Occupational Safety and Health Review Board (the Board). Thus, Complainant is correct that the motion cannot be certified to the Commissioner of Labor and Industry under the provision of Minn. R. 1400.7600 that prohibits certification where the Judge’s report is binding on the agency. However, certification to the Board is a possibility since the statute allows appeal of a final decision on the merits by an Administrative Law Judge to the Board.

Applying the standards for certification in Minn. R. 1400.7600 leads the Administrative Law Judge to conclude that the matter should not be certified to the Board. Respondent argues that any delay in certifying the motion would not adversely affect Complainant. The Administrative Law Judge agrees; the likely delay of several weeks should have little significant impact upon the discovery responses. Respondent also argues that waiting until after the hearing would render the motion moot because Respondent would have been forced to respond to the discovery requests in spite of the potential conflicts between its ability to respond to the discovery requests and its employees' rights against self-incrimination. Respondent has never demonstrated that it has no employee who can answer the discovery requests without self-incrimination, but, assuming that to be the case for this argument, the Administrative Law Judge agrees that a subsequent determination that the discovery order was improper would have little meaning. Nonetheless, the controlling factor here is that the issues in dispute are procedural and discovery issues that are to be determined by the Administrative Law Judge. Thus, certification to the Board must be denied.

Respondent noted that writs of prohibition are available in civil litigation to relieve a party of an erroneous discovery order. Respondent's Memorandum, at 6. Respondent is correct that the process is available in civil litigation, but incorrect to imply that the writ is not available in administrative hearings. The Minnesota Supreme Court described the writ as follows:

A writ of prohibition is an extraordinary writ issued for the purpose of preventing inferior courts or tribunals or other individuals invested by law with judicial or quasi-judicial authority from going beyond their jurisdiction.
5 Dunnell, Dig. & Supp. § 7840.

Nemro v. Local Joint Executive Bd. and Hotel and Restaurant Emp. Local No. 556, 35 N.W.2d 337, 340 (Minn. 1948). Since the creation of the Minnesota Court of Appeals, it would appear that it would have jurisdiction to issue a writ of prohibition in this case. See Minn. Stat. § 480A.06, subds. 4 and 5, and Minn. R. Civ. App. Pro. 120.

Respondent has the right to seek a writ of prohibition. Clearly, the constitutional and criminal law issues raised by Respondent should be reviewed by a court rather than an administrative body. To ensure that the Respondent has an unfettered opportunity to seek such a writ, this matter will be stayed for thirty days. The stay will be extended if Respondent's application for a writ is set on for hearing before a court of appropriate jurisdiction. If Respondent fails to act or the writ is denied, the stay will expire at the end of the thirty day period.

S.M.M.